Supreme Court, U.S.
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No. 03-

IN THE

# Supreme Court of the United States

CURTIS MAJOR, DAVID DOBSON,
BENJAMIN BUCHANAN, TROY BUCHANAN,
and CARLOUS L. BURCH,

*Petitioners*,

*v.*

ELLER MEDIA COMPANY, a Foreign Corporation
doing business in Florida,

*Respondent.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether an employer is subject to liability under Title VII for adopting, without independent review, the discriminatory hiring recommendations of a non-employee.

## PARTIES TO THE PROCEEDING

In addition to the Petitioners, there were two additional Plaintiffs in the proceeding before the United States District Court for the Southern District of Florida: Edward Crouch and Jamie Young. These Plaintiffs voluntarily dismissed their claims against Respondent Eller Media Company.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Question Presented | i |
| Parties to the Proceeding | ii |
| Table of Contents | iii |
| Table of Cited Authorities | iv |
| Table of Appendices | viii |
| Opinions of the Courts Below | 1 |
| Statement of Jurisdiction | 1 |
| Statutory Provisions Involved | 2 |
| Statement of the Case | 3 |
| Reasons for Granting the Petition | 9 |
| I. The Writ Should Issue Because the Eleventh Circuit Decision Precludes Employer Liability for Tangible Employment Actions Which Are Based on the Discriminatory Recommendations of a Non-Employee. | 10 |
| II. The Writ Should Issue Because the Decision of the Eleventh Circuit Sanctions a Serious Departure from this Court's Application of Common Law Agency Analysis to Title VII. | 16 |
| Conclusion | 19 |

## TABLE OF CITED AUTHORITIES

*Page*

**Cases**

*Amtrak v. Morgan*,
536 U.S. 101 (2002) ..... 11

*Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans et al. v. Norris*,
463 U.S. 1073 (1983) .....12, 13, 14, 16

*Buel v. ASSE International, Inc.*,
233 F.3d 441 (7th Cir. 2000) ..... 16

*Burlington Indus., Inc. v. Ellerth*,
524 U.S. 742 (1998) .....11, 16, 17, 18

*Cabrera v. Jakabovich*,
24 F.3d 372 (2nd Cir. 1994), *cert. denied*, 513 U.S. 876 (1994) ..... 16

*City of Chicago v. Matchmaker Real Estate Sales Center*, 982 F.2d 1086 (7th Cir. 1992), *cert. denied*, 508 U.S. 972 (1993) ..... 14

*Desert Palace, Inc. v. Costa*,
123 S. Ct. 2148, 156 L. Ed. 2d 84 (2003) ..... 11

*Faragher v. City of Boca Raton*,
534 U.S. 775 (1998) ..... 11, 16, 17, 18

*Cited Authorities*

*Page*

*Los Angeles Dept. of Water and Power v. Manhart*,
435 U.S. 702 (1978) ..... 12

*Meritor Savings Bank, FSB v. Vinson*,
477 U.S. 57 (1986) ..... 16

*Meyer v. Holley*,
537 U.S. 280, 123 S. Ct. 824, 154 L. Ed. 2d 753
(2003) ..... 16, 17, 18

*Robinson v. Shell Oil Co.*,
519 U.S. 337 (1997) ..... 11

*Walters v. Metropolitan Ed. Enterprises, Inc.*,
519 U.S. 202 (1997) ..... 11

**Statutes**

28 U.S.C. § 1254(1) ..... 1

28 U.S.C. § 1331 ..... 7

28 U.S.C. § 1367(a) ..... 7

Title VII of the Civil Rights Act of 1964,
*as amended*, 42 U.S.C. § 2000e, *et seq.* (2003) ... 1, 6

Title VII of the Civil Rights Act of 1964,
*as amended*, 42 U.S.C. § 2000e (2003) ..... 13, 19

*Cited Authorities*

*Page*

Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. § 2000e(b) (2003) ..... 2, 11

Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. § 2000e-2 (2003) ..... 3

Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. § 2000e-2(a)(1) (2003) .. 11

Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. § 2000e-5(F)(3) ..... 7

Florida Civil Rights Act of 1992, Fla. Stat., § 760.01 *et seq.* (2000) ..... 6-7

**Restatement (Second) of Agency (1958)**

RESTATEMENT (SECOND) OF AGENCY, § 1(1) (1958) .. 14

RESTATEMENT (SECOND) OF AGENCY, § 219 (1958) ... 17

RESTATEMENT (SECOND) OF AGENCY, § 225 (1958) ... 15-16

RESTATEMENT (SECOND) OF AGENCY, § 229 (1958) ... 18

*Cited Authorities*

*Page*

**Rules**

FED. R. CIV. P. 56 ..... 1

Local Rule of Appellate Procedure, 11th Cir.R.36-1 .. 9

## TABLE OF APPENDICES

*Page*

Appendix A — Opinion Of The United States Court Of Appeals For The Eleventh Circuit Dated June 6, 2003 ..... 1a

Appendix B — Order Granting Summary Judgment And Final Judgment Of The United States District Court For The Southern District Of Florida Dated August 10, 2002 And Filed August 13, 2002 ..... 3a

Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit which affirmed the dismissal of Petitioners' claims under Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. § 2000e, *et seq*. (2003).

## OPINIONS OF THE COURTS BELOW

The District Court's opinion (per Moreno, J.) granting Respondent's Motion for Summary Judgment is attached hereto as Appendix B (hereinafter "Pet. App. B"). The decision of the Court of Appeals for the Eleventh Circuit (hereinafter "Eleventh Circuit"), affirming the District Court's order granting summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, is reported in the Table Opinions of the Eleventh Circuit at *Major, et al. v. Eller Media Co.*, Case No. 02-14959, 2003 U.S. App. LEXIS 17871 (11th Cir., June 6, 2003). The decision is attached hereto as Appendix A (hereinafter "Pet. App. A").

## STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Eleventh Circuit was entered on June 6, 2003. This Court has jurisdiction to issue the requested Writ of Certiorari pursuant to 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

Section 2000e(b) of the Title VII of the Civil Rights Act of 1964 provides, in relevant part:

**§ 2000e. Definitions**

> **(b)** The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5 of the United States Code), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of the Internal Revenue Code of 1954 [26 USCS §§ 501(c)] except that during the first year after the date of enactment of the Equal Employment Opportunity Act of 1972 [enacted March 24, 1972], persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

42 U.S.C. § 2000e(b) (2003).

Section 2000e-2 of the Title VII of the Civil Rights Act of 1964 provides, in relevant part:

**§ 2000e-2. Unlawful employment practices**

> (a) Employer practices. It shall be an unlawful employment practice for an employer –
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2 (2003).

## STATEMENT OF THE CASE

Petitioners are five African-Americans who were employed by AK Media in its South Florida location. AK Media South Florida was an outdoor advertising company engaged in the business of selling and constructing outdoor advertising such as poster panels, billboards and transit shelters. In the fourth quarter of 1999, the Respondent, Eller

Media Company (hereinafter "Eller" or "Respondent") announced that it would purchase the assets of AK Media's South Florida operation. The terms of the Asset Purchase Agreement state that Eller would determine, in its sole discretion, which of AK Media's existing employees would be offered employment at the close of the transaction. At the time of the sale, on January 4, 2000, AK Media's South Florida operation had approximately one hundred and twelve (112) employees. Approximately sixty-two (62) of these employees worked in the Operations Department, which included four sub-departments: rotary/construction, posting, painting and electrical. Petitioners were employed in the Posting Department of AK Media's Operations Department. Don Hall was the Operations Manager for AK Media.

Prior to the sale, in early December 1999, Don Hall was advised by AK Media's President, Claire Lawson, to set aside time to meet with Eller's Executive Vice-President of Operations, Mike Deeds. Soon thereafter, Mr. Hall and Mr. Deeds met in Miami and discussed AK Media's operations and Mr. Hall escorted Mr. Deeds around AK Media's plant and facilities. At that time, Mr. Deeds instructed Mr. Hall to consider the number of people that were employed in AK Media's Operations Department and the extent of AK Media's equipment and inventory, and to "consider the possibility of a reduction in all categories." Mr. Deeds further indicated to Mr. Hall that he would soon be providing additional instructions to him relating to the Operations Department.

Mr. Deeds called Mr. Hall again later in December, 1999 and advised Hall that, for an Operations Department of AK Media's capacity, he thought twelve to thirteen employees would be sufficient to service the rotary/construction department, eight to ten employees would be sufficient to

service the posting department, two to three employees would be sufficient to service the painting department, four to five employees would be sufficient to service the electrical department and that one mechanic would suffice. Mr. Deeds again instructed Mr. Hall to think about these personnel numbers, to consider the number of employees he would possibly be working with and corresponding reductions in equipment.

A few days later, John Jacobs, Eller Media's new South Florida General Manager, conveyed to Mr. Hall that Hall should "decide and recommend people that would be able to be retained to maintain the numbers that Mike Deeds had given" to him and to "recommend to him names of people that [he] felt would be able to do the job." Based on the information conveyed to him by Eller Media's VP of Operations, Mike Deeds, and Eller Media's General Manager, John Jacobs, Mr. Hall understood that he had been "given the responsibility to fit the amount, the proper amount of people for each operation, in the operation, you know, to operationally run the company." Specifically, Jacobs gave Hall the task of selecting and recommending thirty-seven (37) operations department employees from a pool of sixty-two (62) for continued employment with Eller.

Pursuant to Jacobs' directions, Hall, while still an AK Media employee, compiled a list of individuals working in the AK Media Operation Department whom Eller should retain. John Jacobs adopted the list without independently reviewing Hall's selections. On January 4, 2000, Eller's asset purchase transaction was completed. On that same day, all AK Media employees were terminated and they learned whether would be offered employment by Eller. On January 4, 2000, the Petitioners learned that they were not offered employment by Eller. On that same day, Don Hall was retained by Eller as its Operations Manager.

In March, 2000, Petitioners filed administrative charges of discrimination with the Equal Employment Opportunity Commission alleging that they were not hired and/or retained by Eller Media based on racially discriminatory hiring practices by Operations Manager, Don Hall. Eller formally responded to the EEOC administrative charges and described the decision-making process for the AK Media Operations Department employees as follows:

> John Jacobs, the General Manager of Eller, requested that Don Hall, the Operations Manager, and Bill Hull, the Assistant Operation Manager for AK Media, make recommendations to him as to whom Eller should consider for positions with the company. Mr. Hall and Mr. Hull were faced with the difficult and disheartening task of selecting thirty-seven employees from a pool of sixty-two . . . Although Mr. Hall made the recommendations to Eller Media, he had no authority to make the hiring decisions. The authority to hire lay solely with John Jacobs. Mr. Jacobs gave Mr. Hall approximately two weeks to provide him with the recommendations and requested that Mr. Hall recommend the best individuals for the available positions.

Subsequently, on October 13, 2000, this action was filed in the Southern District of Florida by Petitioners against Eller alleging that they were not retained or hired by Eller Media following its purchase of AK Media's South Florida Operation based on their color and race in violation of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. § 2000e, *et seq.*, the Civil Rights Act of 1870, *as amended*, 42 U.S.C. § 1981, and the Florida Civil Rights Act, § 760.01, *et seq.*,

Fla. Stat. (2000). Petitioners alleged that Eller's hiring decisions were based on the intentionally racially discriminatory hiring recommendations of Don Hall, then an AK Media employee, to whom Eller specifically delegated that responsibility and which recommendations Eller adopted. Jurisdiction in the court of first instance, the United States District Court for the Southern District of Florida, was invoked pursuant to 28 U.S.C. § 1331 and 42 U.S.C. § 2000e-5(F)(3). The Court had supplemental jurisdiction over Petitioners' state law claims pursuant to 28 U.S.C. § 1367(a).

Following extensive discovery, Eller moved for summary judgment and argued that each Petitioner released Eller from liability, that Eller could not be held liable for Don Hall's actions and, even if Eller could be held liable, no plaintiff could demonstrate the existence of genuine issues of material fact with respect to the pretextual nature of Don Hall's legitimate non-discriminatory reasons for not recommending them for hire by Eller.

On August 13, 2002, the District Court granted Eller Media's motion for summary judgment, without reaching the merits of Petitioners' claims, "[b]ecause this Court finds that no agency relationship existed between the alleged discriminator, Don Hall, and the Defendant, Eller Media." (Pet. App. B). The District Court explicitly found that:

1. "To determine which AK Media employees would be hired following the sale of AK Media assets, Eller sought the assistance of AK Media Operations Manager, Don Hall, to make the decision as to which Operations Department employees it should offer continued employment." (Pet. App. 4a-5a);

2. "Don Hall completed a list of individuals whom Eller should retain, and then met with Frank Sofia, AK Media's Vice President of Finance, and John Jacobs, the President of Eller to discuss the list [and] John Jacobs adopted the list almost wholesale." (Pet. App. 5a).

3. "As a result of Eller's retention decisions based on Don Hall's hiring recommendations, a higher percentage of African-American employees in AK Media's Operation Department were not offered positions at Eller than non-African American employees." (Pet. App. 5a).

The record evidence supporting the District Court's finding that a higher percentage of African-American employees were not offered positions at Eller than non-African-American employees reflects that, as of January 4, 2000, there were sixty-two (62) employees in the AK Media Operations Department. Of the 62 employees, nine (9) were African American and fifty-three (53) were non-African American. Only two (2) of the nine (9) or 22% of the African American Operations Department employees were offered employment by Eller. In contrast, thirty-six (36) or 68% percent of non-African American Operations Department employees were offered employment by Eller. The imbalance between African-Americans and non-African Americans was more severe in the Posting Department of the Operations Department where five (5) out of six (6) African-Americans, including all of the Petitioners in this case, were not retained by Eller whereas two (2) of eleven (11) non-African Americans were not retained.

Notwithstanding its factual findings, however, the District Court concluded that a decision on the merits could not be reached because "the law at this time precludes legitimately aggrieved persons – and at least two of the Plaintiffs fall within that category – from obtaining relief." (Pet. App. 7a). The District Court concluded that it was "in no position to depart from case precedent and attach liability for the acts of a non-employee" and, thus, could "not look to Mr. Hall's actions in determining the liability of Eller." (Pet. App. 7a, 11a).

On appeal to the Eleventh Circuit, Petitioners sought review of the District Court's order holding that Don Hall's non-employee status precluded a determination on the merits. Similarly, Eller sought an affirmance of the order granting summary judgment only on the grounds relied upon by the District Court. On June 6, 2003, the Court of Appeals affirmed *per curiam* without opinion pursuant to Local Rule of Appellate Procedure, 11th Cir. R. 36-1.

This Petition for a Writ of Certiorari followed.

## REASONS FOR GRANTING THE PETITION

This Court should issue a Writ of Certiorari to review the Eleventh Circuit decision affirming the District Court's order granting summary judgment to the Respondent Employer for two reasons. *First*, the Eleventh Circuit's affirmance of the District Court's order shields an employer from Title VII liability for a tangible employment action based on the discriminatory recommendation of a non-employee and establishes a permissible avenue for the wholesale avoidance of Title VII liability. *Second*, the decision of the Eleventh Circuit erroneously affirms an

important question of federal law which contravenes the statutory language of Title VII and sanctions a serious departure from this Court's application of common law agency principles to Title VII.

## I. The Writ Should Issue Because the Eleventh Circuit Decision Precludes Employer Liability for Tangible Employment Actions Which Are Based on the Discriminatory Recommendations of a Non-Employee.

This case merits review by this Court because the decision below, affirmed on appeal, shields an employer from liability under Title VII for its discriminatory failure to hire when that decision is based on the employer's solicited recommendation of a non-employee. It is undisputed that the challenged employment decisions at issue in this case are those of the employer, Eller Media. The District Court's fundamental error – holding that Eller cannot be held liable for its hiring decisions based on the recommendations of a non-employee notwithstanding its findings that Eller requested that the non-employee to make the recommendations, that Eller adopted the non-employee's recommendations "wholesale" and that, as a result of Eller's retention decisions based on the non-employee's recommendations, a higher percentage of African-American employees in AK Media's Operation Department were not offered positions at Eller than non-African American employees – has serious and potentially wide-ranging consequences in Title VII litigation.

Under Title VII of the Civil Rights Act of 1964, it is an "unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his

compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1) (2003). Section 2000e(b) of the Act defines employer as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, **and any agent of such a person . . .**" 42 U.S.C. § 2000e(b) (2003) [emphasis added].[1] In acknowledging Congress' decision to explicitly include the term "agent" in § 2000e(b), this Court recognized that "the very definition of employer in Title VII, as including an 'agent,' expressed Congress's intent that courts look to traditional principles of the law of agency in devising standards of employer liability . . ." *Faragher v. City of Boca Raton*, 534 U.S. 775, 791-792 (1998); *see also Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 754 (1998). Rather than engraft sections of the Restatement (Second) of Agency into Title VII, a court's obligation is to "adapt agency concepts to the practical objectives of Title VII." *Faragher*, 524 U.S. at 803 n.3.

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1. The starting point in the analysis of a Title VII case is the statute itself. *See Desert Palace, Inc. v. Costa*, 123 S. Ct. 2148, 2153, 156 L. Ed. 2d 84, 93-94 (2003). "In the absence of an indication to the contrary, words in a statute are assumed to bear their 'ordinary, contemporary, common meaning.'" *Amtrak v. Morgan*, 536 U.S. 101, 110 n.5 (2002) *quoting Walters v. Metropolitan Ed. Enterprises, Inc.*, 519 U.S. 202, 207 (1997). "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997).

This Court, in *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702 (1978), held that the Los Angeles Department of Water and Power violated Title VII's prohibition against sex discrimination when it required its female employees to make higher monthly pension fund contributions than male employees. 435 U.S. 702, 718 n.33 (1978). In so doing, the Court cautioned that, while Title VII primarily governs "relations between employees and their employer, not between employees and third parties," an employer could not avoid responsibility for discriminatory benefit programs by delegating them to third parties. *Manhart*, 435 U.S. at 718 n.33 (1978). Five years later, in *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans et al. v. Norris*, 463 U.S. 1073 (1983), this Court addressed whether "Title VII also prohibits an employer from offering its employees the option of receiving retirement benefits from one of several companies selected by the employer, all of which pay a woman lower monthly benefits than a man who has made the same contribution." 463 U.S. 1073, 1075 (1983). Unlike the employer in *Manhart*, the state employer in the *Arizona* case did not provide the fringe benefit plan itself; rather, the State provided employees with the opportunity to voluntarily obtain annuities as part of its deferred compensation plan by selecting several insurance companies, among whom employees could choose, to provide retirement benefits. *Arizona*, 463 U.S. at 1089. The insurance companies, in turn, used sex-based mortality tables to calculate monthly retirement benefits which resulted in a lower monthly benefit to female retirees because women live longer than men. *Id.* at 1077. The Court first determined that, under *Manhart*, the State of Arizona would violate Title VII if they had run the entire deferred compensation plan themselves. *Id.* at 1079-1987. Turning to the precise issue before it, the

Court then analyzed whether the employer's conduct was "beyond the reach of the statute because it is the companies chosen by [the employer] to participate in the plan that calculate and pay the retirement benefits" and not the employer itself. *Id.* at 1087. Noting that 42 U.S.C. § 2000e applies to employers and "any agent" of an employer, the Court held that "there can be no serious question" that the employer is liable for the discriminatory terms on which annuities were offered to its employees because the employer selected the insurance companies which provided employee benefits on discriminatory terms. *Id.* 1087 & n.16. The Court held that an "employer that adopts a discriminatory fringe benefit scheme that discriminates among its employees on the basis of race, religion, sex, or national origin violates Title VII regardless of whether third parties are also involved in the discrimination" because:

> [i]t would be inconsistent with the broad remedial purposes of Title VII to hold that an employer who adopts a discriminatory fringe benefit plan can avoid liability on the ground that he could not find a third party willing to treat his employees on a non-discriminatory basis. An employer who confronts such a situation must either supply the fringe benefit himself, without the assistance of any third party, or not provide it at all.

*Id.* at 1090-91. The Court noted that "[s]uch a result would be particularly anomalous where, as here, the employer made no effort to determine whether third parties would provide the benefit on a neutral basis." *Id.* 1091 n.24.

The Court's reasoning in *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans, et al. v. Norris* applies with equal force to Eller's decision not to retain the Petitioners based on the discriminatory hiring recommendations of Don Hall, its chosen agent. It would be inconsistent with the broad remedial purposes of Title VII to permit Eller, who delegated the hiring recommendation and selection process to Don Hall and adopted his discriminatory recommendations, to avoid liability for its decisions simply because Eller hired Don Hall ***after*** it adopted his discriminatory hiring recommendations. Don Hall's "non-employee" status as of the January 4, 2000 closing of the Asset-Purchase Transaction notwithstanding, the Eleventh Circuit erred in affirming the District Court's conclusion that Don Hall was not Eller's "agent" for purposes of Title VII.

Section 1 of the Restatement (Second) of Agency (1958) defines "agency" as a legal relationship characterized by the "manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other to so act." RESTATEMENT (SECOND) OF AGENCY, § 1(1) (1958).

> As a matter of well-settled agency law, a principal may be held liable for the discriminatory acts of his agent if such acts are within the scope of the agent's [ ] authority, even if the principal neither authorized nor ratified the acts.

*City of Chicago v. Matchmaker Real Estate Sales Center*, 982 F.2d 1086, 1096 (7th Cir. 1992), *cert. denied*, 508 U.S. 972 (1993). The District Court's order in this case acknowledges that Eller directed Don Hall to do much more than identify the "good" employees and provide their

personnel files to Eller for review and decision. Finding that "Eller sought the assistance of AK Media Operations Manager, Don Hall, to make the decision as to which Operations Department employees it should offer continued employment," that "Don Hall completed a list of individuals whom Eller should retain," and that "John Jacobs adopted the list almost wholesale," the record reflected that Eller, through General Manager John Jacobs and Executive Vice-President Mike Deeds, gave Don Hall the exact numbers by which it sought to reduce existing AK Media personnel, asked Hall to provide Eller with his recommendations as to which specific AK Media employees Eller should retain, identified criteria on which to base his recommendations, dictated the time frame during which Hall was to provide his recommendations, and required Hall to present them to Eller. In compliance with these directives, Mr. Hall prepared a written list of AK Media employees whom he recommended to Eller for continued employment by Eller and provided it to Mr. Jacobs. Jacobs adopted Hall's hiring recommendations without independently reviewing them. These facts establish an agency relationship between Eller Media and Don Hall sufficient for purposes of Title VII. The District Court's analysis, as affirmed by the Eleventh Circuit, results in Eller's immunity for racially discriminatory hiring decisions premised solely upon Eller's delegation of the selection and recommendation tasks to Don Hall because Hall was not on Eller's payroll as of the date of the hiring decisions.[2] This Court should correct this result.

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2. That Don Hall acted *gratuitously* or agreed to act for the benefit of Eller without consideration (i.e., payment and/or the promise of a position in the new company) in agreeing to make the hiring recommendations requested by Eller does not negate the existence of an agency relationship. *See* RESTATEMENT (SECOND) OF

(Cont'd)

## II. The Writ Should Issue Because the Decision of the Eleventh Circuit Sanctions a Serious Departure from this Court's Application of Common Law Agency Analysis to Title VII.

This Court recently applied the well-settled principle that "traditional vicarious liability rules ordinarily make principals or employers vicariously liable for acts of their agents or employees in the scope of their authority or employment." *Meyer v. Holley*, 537 U.S. 280, 123 S. Ct. 824, 829, 154 L. Ed. 2d 753, 761 (2003) (quoting *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 756 (1998)). In the Title VII context, traditional agency principles guide these liability determinations. *See Burlington Industries, Inc.*, 524 U.S. 742, 754-55; *Faragher v. City of Boca Raton*, 524 U.S. 755, 803 n.3 (1998); *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986) ("Congress wanted courts to look to agency principles for guidance."). The term "agent" should be liberally construed to effect Title VII's remedial purposes. *See Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans et al. v. Norris*, 463 U.S. 1073 (1983).

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(Cont'd)

AGENCY, § 225 cmt. a ("Consideration is not necessary to create the relation of principal and agent, and it is not necessary in the case of master and servant."); *see also Buel v. ASSE International, Inc.*, 233 F.3d 441 (7th Cir. 2000) (holding international foreign exchange student organization liable for volunteer's failure to protect foreign exchange student). *See Cabrera v. Jakabovich*, 24 F.3d 372, 385-88 (2d Cir. 1994), *cert. denied*, 513 U.S. 876 (1994) (In the Fair Housing context, "[t]he fact that the tenants paid the broker does not preclude a finding that the broker acted as the owner's agent in renting the apartment.").

These decisions, including *Meyer v. Holley*, *Faragher v. City of Boca Raton and Burlington Industries, Inc. v. Ellerth*, address liability for violations of civil rights laws and establish that a principal is liable for the civil rights violations of their agents when those violations are committed in the exercise of delegated authority. *See Meyer*, 123 S. Ct. at 829, 154 L. Ed. 2d at 761; *Burlington Industries, Inc.*, 524 U.S. at 761-66; *Faragher*, 524 U.S. at 802-10. Under these common law agency principles, where the "tortious conduct is made possible or facilitated by the actual agency relationship," Don Hall's racially discriminatory animus is imputed to Eller. *Faragher*, 524 U.S. at 802-03 *citing* RESTATEMENT (SECOND) OF AGENCY, § 219, cmt e. An employer is held responsible for the acts of its management level employees when they unlawfully carry out traditional employer functions, such as hiring and firing, because these decisions are the "means by which the supervisor brings the official power of the enterprise to bear on subordinates . . . [which] requires an official act of the enterprise, a company act." *Burlington Industries, Inc.*, 524 U.S. at 762. While not an "employee" of Eller, Don Hall carried out Eller's traditional employer functions at Eller's request. Even though Eller hired Hall ***after*** it adopted his employment recommendations, Eller delegated to Don Hall (and Don Hall accepted) the authority to recommend whom at AK Media should be offered continued employment with Eller. Eller's hiring decisions were based on Don Hall's recommendations, from which Eller benefitted. Don Hall's discriminatory animus toward African-American AK Media employees was facilitated by Eller's delegation of authority to him. Eller's wholesale adoption of Hall's recommendations resulted in tangible employment action – an act for which the employer, Eller, should be held responsible.

Under the analysis of *Meyer*, *Faragher* and *Burlington*, Eller would undoubtedly be held accountable under Title VII for failing to hire AK Media's African-American employees based on their race had John Jacobs independently made the hiring decisions rather than merely adopting Don Hall's recommendations. As with managerial employees who misuse delegated authority, "there is assurance the injury could not have been inflicted absent the agency relation." *Burlington Industries, Inc.*, at 761-62. Absent Eller's decision to delegate the selection and recommendation authority to Don Hall, no such injury would have been inflicted. *See Faragher*, at 797 (quoting RESTATEMENT (SECOND) OF AGENCY, § 229 cmt. a (1958)) ("'whether or not it is just that the loss resulting from the servant's acts should be considered as one of the normal risks to be borne by the business in which the servant is employed.'"). This Court should correct this result.

## CONCLUSION

For the reasons set forth above, Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit which affirmed the dismissal of Petitioners' claims under Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. § 2000e, *et seq.* (2003).

Respectfully submitted,

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# APPENDIX

**APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED JUNE 6, 2003**

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-14959

D. C. Docket No. 00-03870 CV-FAM

CURTIS MAJOR, DAVID DOBSON, et al.,

Plaintiffs-Appellants,

versus

ELLER MEDIA COMPANY,
a Foreign Corporation doing business in Florida,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(June 6, 2003)

Before DUBINA, BLACK and HULL, Circuit Judges.

PER CURIAM:

*Appendix A*

AFFIRMED. *See* 11th Cir. R. 36-1.[1]

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1. 11th Cir. R. 36-1 provides:

When the court determines that any of the following circumstances exist:

(a) judgment of the district court is based on findings of fact that are not clearly erroneous;

(b) the evidence in support of a jury verdict is sufficient;

(c) the order of an administrative agency is supported by substantial evidence on the record as a whole;

(d) summary judgment, directed verdict, or judgment on the pleadings is supported by the record;

(e) judgment has been entered without a reversible error of law; and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

**APPENDIX B — ORDER GRANTING SUMMARY JUDGMENT AND FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA DATED AUGUST 10, 2002 AND FILED AUGUST 13, 2002**

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
Miami Division

**Case Number: 00-3870-CIV-MORENO**

CURTIS MAJOR, DAVID DOBSON,
BENJAMIN BUCHANAN,
TROY BUCHANAN, and CARLOUS L. BURCH,

Plaintiffs,

vs.

ELLER MEDIA COMPANY, a Foreign Corporation
doing business in Florida,

Defendant.

**ORDER GRANTING SUMMARY JUDGMENT**

Defendant has moved for summary judgment on all claims in the Complaint filed by the five remaining Plaintiffs alleging discrimination based on race in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.* ("Title VII"), The Civil Rights Act of 1866, 42 U.S.C. § 1981 ("Section 1981"), and the

*Appendix B*

Florida Civil Rights Act of 1992, Chapter 760 of the Florida Statutes ("FCRA").

Because this Court finds that no agency relationship existed between the alleged discriminator, Don Hall, and the Defendant, Eller Media ("Eller"), this Court grants Eller's Motion for Summary Judgment.

## I. Background

Eller first announced its intent to acquire AK Media during the fourth quarter of 1999 and immediately began plans to consolidate job functions and downsize the combined Eller Media/AK Media South Florida operation. At the time of the acquisition, AK Media sold painted bulletins, poster panels and transit shelters and maintained an in-house printing company. Eller's existing operation in South Florida was an outdoor advertising company with only one product line — transit shelters.

At the time of the sale, AK Media had over 112 employees, 60 of which were employed in its operations department. The Eller Media facility employed only 27 employees in its operations department. Eller planned on running the combined organization with 46 employees in the operations department. It expected to offer positions to about 40 AK Media employees and 6 existing Eller employees in the operations department.

To determine which AK Media employees would be hired following the sale of AK Media's assets, Eller sought the assistance of AK Media Operations Manager Don Hall to

make recommendations to Eller as to which Operations Department employees it should offer continued employment. Don Hall[1] compiled a list of individuals whom Eller should retain, and then met with Frank Sofia, AK Media's Vice President of Finance, and John Jacobs, the President of Eller South Florida, to discuss the list. John Jacobs adopted the list almost wholesale.

On January 4, 2000, Eller purchased the assets of AK Media. That same day, all AK Media employees were terminated and Plaintiffs learned they would not be hired by Eller. At the same time, Eller made it known to which of AK Media's existing employees it would offer employment. Also on January 4, 200, all five Plaintiffs entered into a Release Agreement with AK Media and its "directors, officers, agents, trustees, employees, employee-spouses, successors and assigns," releasing AK Media from liability arising out of their employment and termination from AK Media.

As a result of Eller's retention decisions based on Don Hall's hiring recommendations, a higher percentage of African American employees in AK Media's Operations Department were not offered positions at Eller than non-African American employees.

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1. Don Hall was not Eller's employee and had not received a job offer from Eller when he made these recommendations. He did not receive an offer of employment until all other AK Media employees received theirs on January 4, 2000.

*Appendix B*

## II. Analysis

### A. Standard of Review

Summary judgment is authorized when there is no genuine issue of material fact. Fed. R. Civ. P. 56(c). The party seeking summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). The party opposing the motion for summary judgment may not simply rest upon mere allegations or denials of the pleadings; the non-moving party must establish the essential elements of its case on which it will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). The nonmovant must present more than a scintilla of evidence in support of the nonmovant's position. A jury must be able reasonably to find for the nonmovant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986).

### B. Vicarious Liability[2]

Plaintiffs attempt to hold Eller liable for the discriminatory acts of Don Hall. Plaintiffs argue either Eller's action was merely a "rubber stamp" of AK Media employee Don Hall's

2. The Court notes the irony of Plaintiffs arguments. First, they argue that the actions of an agent of a non-party should be imputed to the Defendant. They then argue that the Release Agreement does not apply to the Defendant because the record evidence of the Agreement demonstrates the parties' intentions that Eller not assume any obligations with respect to AK Media employees and that Eller is not merely a continuation of AK Media.

allegedly discriminatory recommendations or that Don Hall was acting as Eller Media's agent when he committed the allegedly discriminatory acts. Plaintiffs claim, under either analysis, Eller is liable for Don Hall's actions.

Unfortunately, the law at this time precludes legitimately aggrieved persons — and at least two of the Plaintiffs fall within that category — from obtaining relief. The case of statutes of limitation, releases, arbitrations, pre-emption, limited liability, etc., may, at times, preclude a finding on the merits of a complaint. Nevertheless, this trial court is in no position to depart from case precedent and attach liability for the acts of a non-employee.

**1. Agency**

Eller claims it cannot be held vicariously liable for the discriminatory conduct of a non-employee or non-agent. *See Graves v. County of Dauphin*, 98 F.Supp. 613, 619 (M.D. Penn. 2000); *Williams v. Grimes Aerospace Co.*, 988 F.Supp. 925, 933 (D. S.C. 1997) (dismissing Plaintiffs Title VII claims of racial discrimination where the alleged discriminatory acts were committed by a non-agent/non-employee). Eller argues that because Don Hall was not an employee of Eller Media at the time of the alleged discriminatory conduct, vicarious liability cannot be premised on his acts unless he is considered to have been an agent of Eller Media.

Eleventh Circuit precedent requires a court to apply the general principles of common law in determining agency for the purposes of respondeat superior in a Title VII suit. *Bahadirli v. Domino's Pizza*, 873 F.Supp.1528,1537 (M.D. Ala. 1995); *see also Cobb v. Sun Papers, Inc.*, 673 F.2d 337,

341 (11th Cir. 1982). Because Mr. Hall was not an employee of Eller at the time he made the staffing recommendations, this court must look to the *Restatement (Second) of Agency § 1 (1)* (1957) for an agency determination. The Restatement defines agency as "the fiduciary relation, which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." *Id.* The comment to section 1(1) clarifies that "the principal must in some manner indicate that the agent is to act for him, and the agent must act or agree to act on the principal's behalf and subject to his control." *Id.*, cmt. a. Additionally, the comments define agency as a legal concept "which depends upon the existence of required factual elements: the manifestation by the principal that the agent shall act for him, the agent's acceptance of the undertaking and the understanding of the parties that the principal is to be in control of the undertaking." *Id.*, cmt. b.

The issues turn on whether Eller consented to have Don Hall to act on *behalf* of Eller, subject to Eller's control, and whether Don Hall agreed to this. Viewing the facts in a light most favorable to the Plaintiffs, both Eller and AK Media requested Don Hall to supply staffing recommendations to Eller. Don Hall accepted this undertaking.

The key issue is whether Eller Media had **control** of Mr. Hall's activities during this undertaking. Based on the record evidence, although Eller requested Mr. Hall to provide staffing recommendations, and Eller retained control over the ultimate decision to hire, Eller did not control the process through which Mr. Hall conducted his activities.

*Appendix B*

A factually similar case, *Williams*, involved alleged discrimination by both a staffing company and the contracting employer. *Williams*, 988 F.Supp. at 931. The Plaintiff attempted to base liability on a theory of agency — that each company was acting as the agent of the other. *Id.* at 933. The court stated "the mere fact that one of the contracting parties is empowered to give general directions as to what is to be done without control over the methods or means of doing it does not necessarily have the effect of creating the relation of principal and agent or master and servant." *Id.* In *Williams*, the contracting employer relayed to the staffing company the names of specific individuals it wished to employ. *Id.* The staffing company merely acted as a conduit. The court, however, did not find the requisite level of control necessary to establish an agency relationship. *Id.* It follows then, that where Eller did not name specific individuals it wished to employ, nor did it involve itself in Don Hall's selection process, it cannot be held vicariously liable under a theory of agency.

The cases relied on by plaintiff, *Moham v. Steego Corp.* and *O'Keefe v. Varian Associates, Inc.*, for the proposition that Don Hall was Eller Media's agent do not compel a contrary result. In *Moham v. Steego*, 3 F.3d 873 (5th Cir. 1993), a former employee of a company that was the target of an asset purchase brought a Title VII disparate treatment claim against his former employer for the actions of his supervisors when they refused to allow him to apply for a job with the purchasing company. Mansfield, the purchaser, had given the plaintiffs' supervisors applications for employees, authorized the supervisors to accept the completed applications on its behalf, and had offered the supervisors

jobs before the sale was consummated. Unlike here, the plaintiff in *Moham* sued the seller corporation, not the buyer. Applying section 219 of the Restatement, the court reasoned that, "a master is liable for the acts of his servants committed while acting in the scope of their employment." *Id.* The court concluded that the supervisors were not the selling company's agents because they were acting exclusively for the benefit of the buying company. *Id.* at 876.

The plaintiffs extrapolate that Don Hall, an AK Media employee, was an agent of Eller because he may have acted at least in part to benefit Eller when he provided staffing recommendations. It is undisputed, however, that Hall had no authority, apparent or otherwise, to hire any employees for Eller, and Hall did not have a job offer at the time he made the staffing recommendations. Additionally, Mr. Hall was also benefitting both AK Media and himself when making these recommendations. He was not acting *exclusively* for the benefit of Eller. Even if he were, the *Moham* court did not find that acting exclusively for the benefit of the buyer company made the supervisors agents of the buyer, but instead the court merely held that when the supervisors were acting exclusively for the benefit of the buyer company, they were not acting as agents of the seller corporation. *Id.*

Plaintiff's reliance on *O'Keefe v. Varian Associates, Inc.*, 1998 Westlaw 417498 (N.D. Ill. 1998) is equally misplaced. The court in *O'Keefe* did not, as Plaintiffs suggest, hold that a supervisor of a selling company becomes an agent of the non-employer purchasing company simply by making staffing recommendations to the purchasing company. Like *Moham*,

the selling company's supervisor already had a job offer from the purchasing company when he provided staffing recommendations to the purchasing company. *Id.* at *4. The *O'Keefe* court ruled that the supervisor of the selling company was **not an agent of the seller** where his actions were not motivated by a purpose to serve the seller. *Id.* In fact, the court considered the involvement of the seller's supervisor only as it related to the plaintiffs' claims against the seller — not the claims alleged against the purchaser.

As to Varian, the purchaser, the court focused on Varian's human resources officer, not the alleged acts of the selling company's supervisor. The court did not even look to the supervisor's action in determining the liability of Varian.

Similarly, this court cannot look to Mr. Hall's actions in determining the liability of Eller. Even though the harasser in *Varian* had already received a job offer, and clearly made out a stronger argument for a finding of agency, the Eleventh Circuit did not find that the harasser was acting as the company's agent. This court must follow suit and not look to Mr. Hall's actions in determining the liability of Eller.

**2. Cat's Paw or "Rubber Stamp" Liability**

Plaintiffs argue Eller cannot avoid liability by merely asserting that the *de jure* decisionmaker, Mr. Jacobs, had no specific discriminatory intent, when all Mr. Jacobs did was "rubber stamp" the recommendation of Don Hall who did have such intent. *See Llampallas v. Mini-Circuits, Lab, Inc.*, 163 F.3d 1236 (11th Cir. 1999)(finding "in a cat's paw situation, the harasser clearly causes the tangible employment

action, regardless of which individual actually signed the employee's walking papers."). Indeed, "where the titular decisionmaker is no more than a cat's paw, courts have looked beyond the formal structure of the decisionmaking process and held defendant companies liable for the invidious bias of the *de facto* decisionmaker." *Bernstein v. Sephora*, 182 F.Supp.2d 1214, 1218 (S.D. Fla. 2002).

In *Llampallas*, a female employee brought a Title VII action against her former employer. 163 F.3d at 1239. The alleged harasser and decisionmaker were two different individuals. *Id.* at 1239-40. The Eleventh Circuit determined that when a plaintiff bases liability on the decision of a person who was not the alleged harasser, the plaintiff has the burden to prove that the harasser's discriminatory animus caused the decisionmaker to terminate her employment. *Id.* at 1248. The plaintiff attempted to meet this burden by showing that the harasser employed the decisionmaker as a "cat's paw" who merely rubber-stamped the harasser's decision. *Id.* at 1249. The Court found that cat's paw situations occur only where there is tacit approval of the harasser's decision to terminate the plaintiff. *Id.* Where there is an intervening action, the cat's paw situation is not applicable. *Id.*

Similarly, in *Bernstein*, a jewish woman sued her former employer in a Title VII action based on racial discrimination, alleging she was denied a promotion. 182 F.Supp.2d at 1215. This case presents another situation in which the alleged harasser was not the sole decision maker. Instead, a group of four managers, including the alleged harasser, met to discuss the selection of a store director for a new location. *Id.* at 1224.

The court found that based on these facts, a jury could reasonably infer that the harasser was the reason for the decision not to promote the plaintiff. *Id.* The court determined that because the harasser was one of four participants in a meeting where the promotion decision was made, his participation was truly direct. *Id.*

Defendant contends that *Llampallas* and *Bernstein* are factually distinguishable from Plaintiffs' case in that the alleged discriminators were, undisputedly, employees of the defendant. There is no caselaw in which a court has applied the "cat's paw" doctrine to find an employer liable for the discriminatory animus of a nonemployee. This employment relationship, found in all other "cat's paw" doctrine cases, is absent here.

Additionally, even if the employment status is irrelevant, Plaintiffs' claims still fail. No evidence indicates that John Jacobs held any discriminatory animus towards blacks or intended to discriminate against plaintiff. To show that an adverse employment decision by an admittedly unbiased decision-maker was nonetheless motivated by the discriminatory animus of another, plaintiff must show that the alleged discriminator's involvement in the decision was "truly direct." *Stimpson v. City of Tuscaloosa*, 186 F.3d 1328 (11th Cir. 1999). As the *Stimpson* court explained,

When the biased recommender and the actual decision maker are not the same person or persons, a plaintiff may not benefit from the inference of causation that would arise from their common identity. Instead, the plaintiff must prove that the discriminatory animus behind the recommendation,

and not the underlying employee misconduct identified in the recommendation, was an actual cause of the other party's decision to terminate the employee. *Stimpson*, 186 F.3d at 1331.

In Stimpson, a former police officer sued the city and its civil service board under Title VII for sex discrimination. *Id.* at 1329. The police chief recommended the plaintiff's termination because of unprofessional conduct. *Id.* at 1330. He, however, had no power to unilaterally fire police officers. *Id.* Instead, the Civil Service Board of Tuscaloosa alone held this power. *Id.* Based on the police chief's recommendations, the Board conducted a hearing during which the plaintiff was represented by counsel and presented witnesses in her own defense. *Id.* The Board unanimously decided to terminate the plaintiff. *Id.*

The court found that plaintiff failed to establish a causal link between the alleged animus and her termination. *Id.* at 1331. This link was broken by the Board's hearing and independent decision to actually terminate her. *Id.* The court reaffirmed that "in some cases, a discharge recommendation by a party with no power to actually discharge the employee may be actionable if the plaintiff proves that the recommendation directly resulted in the employee's discharge." *Id.* This causation, however, must be direct.

The Eleventh Circuit refused to draw a bright line that an independent investigation precludes a finding of causation. It found that where the Board has the sole power to terminate officers, and where it conducted a hearing allowing the plaintiff to present witnesses, the plaintiff has failed to show

that a reasonable jury could find causation between the discriminatory animus and the decision to terminate her. *Id.*

Don Hall's involvement in the decision not to hire plaintiff was not "truly direct." He had no power to hire employees for Eller; that power remained, at all times, with Mr. Jones. Additionally, Mr. Hall's recommendations were considered and approved by another AK Media employee, Frank Sofia, before being submitted to John Jacobs, the ultimate decisionmaker. No evidence indicated that Mr. Sofia had a racial animus towards blacks or intended to discriminate against plaintiffs. Plaintiffs offer no evidence to dispute that Mr. Sofia independently reviewed Mr. Hall's recommendations. Even though Mr. Jacobs did not personally review the personnel files of any AK Media employee, he obtained information concerning these employees from Frank Sofia, who had worked at AK Media for nearly 14 years. This process removes Don Hall's animus from the decision making process such that it is no longer "truly direct."

WHEREFORE, the Defendant's Motion for Summary Judgment is GRANTED.

DONE AND ORDERED in Chambers at Miami, Florida, this 10th day of August, 2002.

s/ Federico A. Moreno
FEDERICO A. MORENO
UNITED STATES DISTRICT JUDGE

*Appendix B*

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
Miami Division

**Case Number: 00-3870-CIV-MORENO**

CURTIS MAJOR, DAVID DOBSON,
BENJAMIN BUCHANAN,
TROY BUCHANAN, and CARLOUS L. BURCH,

Plaintiffs,

vs.

ELLER MEDIA COMPANY, a Foreign Corporation
doing business in Florida,

Defendant.

***FINAL JUDGMENT***

Pursuant to Fed. R. Civ. P. 50 and 58, and in accordance with this Court's Order Granting Defendant's Motion for Summary Judgment, judgment is entered in favor of the Defendant ELLER MEDIA COMPANY and against Plaintiffs CURTIS MAJOR, DAVID DOBSON, BENJAMIN BUCHANAN, TROY BUCHANAN, and CARLOUS BURCH. Accordingly it is

**ADJUDGED** that all pending motions are DENIED as moot.

*Appendix B*

DONE AND ORDERED in Chambers at Miami, Florida, this 10th day of August, 2002.

s/ Federico A. Moreno
FEDERICO A. MORENO
UNITED STATES DISTRICT JUDGE